

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PATRICK HABLE,

Plaintiff,

VS.

BENN GODENZI,

Defendant.

Case No.: 2:22-cv-02012-GMN-BNW

ORDER GRANTING MOTION TO DISMISS

Pending before the Court is the Motion to Dismiss, (ECF No. 26), filed by Defendant Benn Godenzi. Also pending before the Court is Defendant's Motion for Judicial Notice in Support of his Motion to Dismiss, (ECF No. 27). Plaintiff Patrick Hable filed a Response, (ECF No. 28), and Defendant filed a Reply, (ECF No. 29).

The Court **GRANTS in part and DENIES in part** Defendant's Motion for Judicial Notice. The Court further **GRANTS** Defendant's Motion to Dismiss but dismisses the case **without prejudice** because Plaintiff failed to allege a material misrepresentation or omission made with scienter.

I. BACKGROUND

Plaintiff bought cryptocurrency from Defendant and now sues Defendant for alleged securities fraud. (*See generally* First Amended Complaint (“FAC”), ECF No. 23). The cryptocurrency purchased in this case, ECOMI (“OMI”), is issued by the Singapore-based company, Ecomi. (*Id.* ¶ 1). Ecomi is operated by Orbis Blockchain Technologies, a New Zealand company. (*Id.* ¶ 13 n.1). In 2018, Ecomi hired Defendant, through his company MB Technology, to advise Ecomi on the structure of OMI tokens. (*Id.* ¶ 21). When Ecomi failed to pay Defendant for his advising service, he sued Ecomi in Singapore through his company MB Technology. (*Id.* ¶ 22).

1 Around the same time, Defendant brought a second lawsuit in New Zealand against
2 Orbis, Ecomi's parent company, related to an investment contract between MB Technology and
3 Orbis. (*Id.* ¶¶ 22, 36–38). The New Zealand Court froze Ecomi's New Zealand assets pending
4 the Singapore litigation. (*Id.* ¶ 22). The parties settled the Singapore litigation in 2021. (*Id.*
5 ¶ 24). After the Singapore settlement, Defendant wrote a chat message on YouTube,
6 apparently to another commenter, that “we *had* a dispute *and moved on*,” in reference to the
7 Singapore litigation. (*Id.* ¶ 30) (emphasis in FAC). He further explained that his contract
8 payment was delayed but the “*dispute was settled and we parted ways amicably*.” (*Id.* ¶ 31)
9 (emphasis in FAC). Thus, Plaintiff alleges, Defendant “told the market that his litigation was
10 resolved,” even though the litigation in New Zealand was ongoing. (*Id.* ¶ 34).

11 In December of 2021, believing that all ongoing litigation had been resolved, Plaintiff
12 agreed to purchase OMI tokens from Defendant. (*Id.* ¶ 44). Defendant told Plaintiff that Ecomi
13 had not paid his contract for a year, “which led to a lawsuit *and of course a settlement*.” (*Id.*)
14 (emphasis in FAC). Following price negotiations, Plaintiff purchased several billion OMI
15 tokens from Defendant for \$12 million worth of USDC currency through multiple transactions.
16 (*Id.* ¶ 48).

17 On June 7, 2022, a New Zealand newspaper called Businessdesk published a story
18 revealing that the suit against Orbis was ongoing in New Zealand. (*Id.* ¶ 2). While the parties
19 dispute the ways in which this news affected the market, Plaintiff alleges that in the six weeks
20 before the article was published, the price of OMI fell 41%. (*Id.*) In the six days after, the price
21 fell another 36%. (*Id.*). Plaintiff claims that he would not have purchased the tokens from
22 Defendant if he knew that litigation was ongoing in New Zealand, and he alleges that the sales
23 constitute securities fraud in violation of the Securities Act, securities fraud under Nevada law,
24 and fraud. (*Id.* ¶ 3). Defendant moves to dismiss, arguing that all three claims are insufficiently
25 pled. (*See generally* Mot. Dismiss, ECF No. 26).

1 **II. LEGAL STANDARD**

2 Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon
 3 which relief can be granted. Fed. R. Civ. P. 12(b)(6). A pleading must give fair notice of a
 4 legally cognizable claim and the grounds on which it rests, and although a court must take all
 5 factual allegations as true, legal conclusions couched as factual allegations are insufficient. *Bell*
 6 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Accordingly, Rule 12(b)(6) requires “more
 7 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will
 8 not do.” *Id.* “To survive a motion to dismiss, a complaint must contain sufficient factual
 9 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
 10 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial
 11 plausibility when the plaintiff pleads factual content that allows the court to draw the
 12 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* This standard
 13 “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

14 **III. DISCUSSION**

15 Defendant moves to dismiss all claims with prejudice in Plaintiff’s FAC. He also asks
 16 the Court to take judicial notice of 23 exhibits relating to the foreign litigation, price of OMI,
 17 and cryptocurrency market trends. The Court first addresses Defendant’s Motion for Judicial
 18 Notice, and then determines whether Plaintiff’s claims have been sufficiently pled.

19 **A. Motion for Judicial Notice**

20 “Generally, a district court may not consider any material beyond the pleadings in ruling
 21 on a Rule 12(b)(6) motion.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542,
 22 1555 n.19 (9th Cir. 1990). The Court “may judicially notice a fact that is not subject to
 23 reasonable dispute because it . . . can be accurately and readily determined from sources whose
 24 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). Otherwise, if a court
 25

1 considers materials outside of the pleadings, the motion to dismiss is converted into a motion
2 for summary judgment. Fed. R. Civ. P. 12(d).

3 Defendant requests that the Court take judicial notice of the exhibits attached to its
4 motion and the “general downward trend exhibited by crypto assets during the relevant 6-week
5 period identified in the FAC.” (Mot. Jud. Notice 2:24–3:2, ECF No. 27). The first four exhibits
6 are court documents relating to the foreign litigation in New Zealand and Singapore. (*Id.* 6:10–
7 14). Following other courts in this circuit, the Court takes judicial notice of these documents
8 for the fact of their filing and relevant parties, but not for the truth of the matters asserted. *See*
9 *Color Switch LLC v. Fortafy Games DMCC*, 377 F. Supp. 3d 1075, 1090 (E.D. Cal. 2019),
10 *aff’d*, 818 F. App’x 694 (9th Cir. 2020); *In re Ex Parte Application of Jommi*, No. C 13-80212
11 CRB (EDL), 2013 WL 6058201, at *2 n.1 (N.D. Cal. Nov. 15, 2013).

12 It is also proper for the Court to consider Exhibit 5, the BusinessDesk article quoted and
13 relied upon in Plaintiff’s FAC. (*See* FAC ¶¶ 2, 14, 37). “[D]ocuments whose contents are
14 alleged in a complaint and whose authenticity no party questions, but which are not physically
15 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.”
16 *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith*
17 *v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

18 The Court does not take judicial notice of Exhibits 6–17, which demonstrate the pricing
19 trends of the OMI token and cryptocurrency markets during the relevant time period. Although
20 courts commonly take judicial notice of historical stock prices and market trends when ruling
21 on a motion to dismiss, the accuracy of the sources reporting cryptocurrency market prices and
22 trends could reasonably be questioned. *See* Fed. R. Evid. 201(b)(2). Plaintiff disputes the
23 comparisons and price data put forward by Defendant and argues that Ecomi is not comparable
24 to the assets in one of Defendant’s proposed indexes. (Resp. 18:26–19:22). Thus, the Court
25 cannot take judicial notice of Exhibits 6–17 at this stage in the proceedings.

1 Lastly, the Court takes judicial notice of the news articles, Exhibits 18–23, for the
 2 narrow purpose of demonstrating that stories about the cryptocurrency market decline were in
 3 the public realm after the articles were published. *See Heliotrope Gen., Inc. v. Ford Motor Co.*,
 4 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice that market was aware of information
 5 in news articles); *see also In re Am. Apparel, Inc. S'holder Litig.*, 855 F.Supp.2d 1043, 1062
 6 (C.D. Cal. 2012) (same). The Court does not take judicial notice of the truth or accuracy of the
 7 news articles' assertions. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d
 8 954, 960 (9th Cir. 2010). Accordingly, the Court GRANTS in part and DENIES in part
 9 Defendant's Motion for Judicial Notice.

10 **B. Securities Fraud Pursuant to Rule 10(b)(5)**

11 Defendant argues that Plaintiff's Federal Securities Claim fails because Plaintiff has not
 12 adequately pled all elements required for a claim of private securities fraud. (Mot. Dismiss
 13 2:10–3:6; 19:22–20:7).¹ Section 10(b) of the Exchange Act and its corresponding Rule 10b–5
 14 prohibit the use of fraud or deceit in connection with the purchase or sale of a security.
 15 15 U.S.C. § 77j(b); 17 C.F.R. § 240.10b-5. The elements of a private securities fraud claim are:
 16 (1) a material misrepresentation or omission, (2) scienter, (3) a connection with the purchase or
 17 sale of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharm., Inc. v.*
 18 *Broudo*, 544 U.S. 336, 341 (2005).

19 Beyond meeting the demands of Rule 12(b)(6), to survive a motion to dismiss, a plaintiff
 20 asserting securities fraud claims must satisfy the heightened pleading requirements of Federal
 21 Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act ("PSLRA"). *See*
 22 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321–24 (2007). Under Rule 9(b), "a
 23

24 ¹ Defendant also argues that Plaintiff's Federal Securities claim must fail because it is an extraterritorial
 25 application of law and therefore does not qualify as a domestic transaction. (Mot. Dismiss 19:22–20:7). But
 even assuming without deciding that Federal Securities Law applies, Plaintiff did not sufficiently plead the facts
 necessary for any of his three fraud related claims, so the Court dismisses the claims on those grounds.

1 party must state with particularity the circumstances constituting fraud” Fed. R. Civ. P.
 2 9(b). To comply with this rule, the complaint must include an account of the “time, place, and
 3 specific content of the false representations as well as the identities of the parties to the
 4 misrepresentation.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (quoting
 5 *Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1393 (9th Cir.1989)). Fraud allegations
 6 must be “specific enough to give defendants notice of the particular misconduct which is
 7 alleged to constitute the fraud charged so that they can defend against the charge and not just
 8 deny that they have done anything wrong.” *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir.
 9 1993) (internal quotation marks omitted).

10 The PSLRA requires that a complaint “specify each statement alleged to have been false
 11 or misleading, the reason or reasons why the statement is misleading, and, if an allegation
 12 regarding the statement or omission is made on information and belief, the complaint shall state
 13 with particularity all facts on which that belief is formed.” 15 U.S.C. § 78u–4(b)(2). Further,
 14 when recovery is dependent on a showing that defendant acted with a particular state of mind,
 15 “the complaint shall [...] state with particularity facts giving rise to a strong inference that the
 16 defendant acted with the required state of mind.” *Id.*

17 **1. Material Misrepresentation or Omission**

18 Plaintiff claims that he relied on two false or misleading statements when purchasing
 19 OMI from Defendant. Defendant’s first alleged statement was made on July 30, 2021, six
 20 months before Plaintiff purchased OMI. (FAC ¶ 30). Defendant wrote, in reference to the
 21 Singapore litigation, that “we *had* a dispute *and moved on*.” (*Id.*) (emphasis in FAC).
 22 Defendant explained that his “contract payment was delayed for about a year,” and he “had no
 23 other choice but to start the legal action.” (*Id.* ¶ 31). He continued, “[t]he dispute was settled
 24 and we parted ways amicably.” (*Id.*). Plaintiff argues that even though Defendant knew
 25 litigation was ongoing in New Zealand, he “told the market that his litigation was resolved.”

1 (*Id.* ¶ 34). And, Plaintiff claims, the parties could not have parted ways amicably because MB
2 Technologies was still in litigation with Orbis in New Zealand. (Resp. 13:8–12).

3 The second allegedly misleading statement occurred when Plaintiff and Defendant
4 discussed the potential sale of OMI. In an online chat, Defendant told Plaintiff that Ecomi had
5 not paid his team’s contract for a year, “which led to a lawsuit *and of course a settlement.*”
6 (FAC ¶ 44) (emphasis in FAC). Defendant then told Plaintiff that his team could offer Plaintiff
7 a 10% discount on that day’s price of OMI, but that “they won’t be doing more than 1b for
8 now.” (*Id.* ¶ 45). Plaintiff clarified the market price, and Defendant replied, “yes that’s okay.”
9 (*Id.* ¶ 46–47). Plaintiff then purchased several billion OMI tokens from Defendant in exchange
10 for \$12 million worth of USDC, another cryptocurrency. (*Id.* ¶ 48).

11 A statement is false if it “directly contradict[s] what the defendant knew at that time,”
12 and is misleading if it “omits material information.” *Khoja v. Orexigen Therapeutics, Inc.*, 899
13 F.3d 988, 1008–09 (9th Cir. 2018). An omission is misleading if it “affirmatively create[s] an
14 impression of a state of affairs that differs in a material way from the one that actually exists.”
15 *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). “[O]nce defendants
16 [choose] to tout positive information to the market, they [are] bound to do so in a manner that
17 wouldn’t mislead investors, including disclosing adverse information that cuts against the
18 positive information.” *Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 705–06 (9th Cir.
19 2016) (quotation marks and citation omitted).

20 Defendant moves to dismiss, contending that he did not make a false or misleading
21 statement. (*See* Mot. Dismiss 17:6–13). On the contrary, he claims that his statements were
22 entirely true because he *did* settle the contract payment litigation. (*Id.*). Moreover, Defendant
23 claims, the FAC does not suggest that the New Zealand litigation was material to Ecomi’s
24 operations, and his subjective opinion regarding his “amicable” relationship with Ecomi would
25 not qualify as a misrepresentation. (*Id.* 17:9–23). Conversely, Plaintiff argues that both

1 statements were misleading, and the statement that Defendant and Ecomi “parted ways
2 amicably,” was false. (Resp. 13:8–12). Plaintiff argues that the statements were made to give
3 Defendant the impression that litigation was over, and that the statement that the parties “parted
4 ways amicably” was “meant to leave readers with the false impression that his legal conflict
5 with Ecomi had concluded.” (*Id.* 14:10–15:19).

6 As an initial matter, the Court does not find the statement that the parties “parted ways
7 amicably,” to be false or misleading. The face of the FAC states that “Godenzi and Ecomi
8 settled the Singapore litigation,” and this litigation focused on Defendant’s unpaid advising
9 contract. (FAC ¶ 22–24). In context, Defendant’s statement referred only to the Singapore
10 contract dispute. Moreover, the statement that the parties had “parted ways amicably” is not
11 obviously untrue or misleading merely because Defendant’s company MB Technologies was in
12 litigation with Orbis over an investment contract. Indeed, “[t]o be misleading, a statement must
13 be capable of objective verification.” *Retail Wholesale & Dep’t Store Union Local 338 Ret.*
14 *Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017). Next, the Court must
15 evaluate whether Defendant’s statements regarding settlement were materially misleading.

16 “Whether its allegations concern an omission or a misstatement, a plaintiff must allege
17 materiality.” *Khoja*, 899 F.3d at 1009. For a misrepresentation or omission to be material,
18 “there must be a substantial likelihood that the disclosure of the omitted fact would have been
19 viewed by the reasonable investor as having significantly altered the ‘total mix’ of information
20 made available.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Put another
21 way, a statement is material if “there is a substantial likelihood that a reasonable investor would
22 have acted differently if the misrepresentation had not been made or the truth had been
23 disclosed.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.
24 2005). However, “[Section] 10(b) and Rule 10b-5(b) do not create an affirmative duty to
25 disclose any and all material information. Disclosure is required under these provisions only

1 when necessary ‘to make . . . statements made, in the light of the circumstances under which
2 they were made, not misleading.’” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44
3 (2011) (quoting 17 C.F.R. § 240.10b-5(b)).

4 Plaintiff did not sufficiently plead that the statements were materiality misleading.
5 Defendant was obligated to mention the New Zealand lawsuit only if it was required to ensure
6 that his statements about the Singapore litigation were not misleading. But as mentioned
7 above, Defendant was discussing his own unpaid advising contract litigation against Ecomi, not
8 all pending litigation against Ecomi and Orbis. Further, Plaintiff does not adequately allege
9 why the New Zealand litigation would be material to a reasonable investor. It is not uncommon
10 for companies to be in litigation. And although the FAC alleged that Ecomi agreed to transfer
11 11.8 billion tokens to MB Technology if MB Technology invested in Orbis, (FAC ¶ 37), the
12 Court is left to draw its own conclusions about why this information would cause a reasonable
13 investor to act differently.

14 Plaintiff’s allegations regarding the materiality of the New Zealand suit are sparse. First,
15 if OMI has a maximum supply of 750 billion tokens, (*id.* ¶ 14), the FAC does not explain why a
16 lawsuit involving less than 2% of its total tokens is material. Second, Plaintiff explained that
17 the “fact of litigation is generally very important to the market for the tokens,” but only
18 supported this conclusion with allegations that a few online commenters were worried about the
19 Singapore litigation. (*See id.* ¶¶ 26–29; 49). Plaintiff put forward no facts to demonstrate that
20 commenters were equally concerned about the New Zealand litigation. Finally, Plaintiff
21 alleged that Ecomi’s assets were frozen while the Singapore litigation was pending, which
22 would clearly be significant to a reasonable investor, but did not allege that Ecomi’s assets
23 remained frozen after the Singapore litigation settled. (*See id.* ¶ 22).

24 In the New Zealand Judgment, Judge Jagose described the two proceedings as
25 “relatively distinct.” (Judgment of Jagose, J., Ex. 4 to Mot. Jud. Notice, ECF No. 27-4).

1 Although this Court does not take the judgment's factual allegations as true, it does find the
2 Judge's description of the two cases to be helpful in determining the relatedness of the actions.
3 The Judge explained that the Singapore lawsuit "related to MB Technology's compensation in
4 OMI tokens" for its advising and exchange listing services to Ecomi, while the New Zealand
5 lawsuit involved "MB Technology's share subscription and transfer investments in Orbis, for
6 which it also was to acquire OMI tokens as a 'bonus' for such investment." (*Id.* ¶ 18). The
7 Judge further drew a distinction between the two cases by noting that "[n]othing in MB
8 Technology's compensation for its provision of services to Ecomi appears to have required it in
9 invest in Orbis." (*Id.*).

10 With these distinctions in mind, Defendant's statements regarding the Singapore
11 litigation did not "affirmatively create an impression of a state of affairs that differs in a
12 material way from the one that actually exists." See *Matrixx Initiatives*, 563 U.S. at 44. At the
13 time both statements were made, MB Technologies and Ecomi had settled the unpaid contract
14 dispute. Defendant did not create a materially different impression by omitting the fact that
15 MB Technologies had also sued Orbis in New Zealand over an investment dispute. Put another
16 way, Defendant did not create the impression that *all* litigation against Ecomi or Orbis had been
17 settled. Thus, Plaintiff failed to adequately plead a material misrepresentation or omission of
18 fact.

19 2. **Scienter**

20 To plead scienter, a plaintiff must "'state with particularity facts giving rise to a strong
21 inference' that defendants acted with the intent to deceive or with deliberate recklessness as to
22 the possibility of misleading investors." *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 987
23 (9th Cir. 2008) (citing 15 U.S.C. § 78u-4(b)(2)). "Facts showing mere recklessness or a motive
24 to commit fraud and opportunity to do so provide some reasonable inference of intent, but are
25 not sufficient to establish a strong inference of deliberate recklessness." *In re VeriFone*

1 *Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 701 (9th Cir. 2012). Courts must “accept all factual
2 allegations in the complaint as true” and “consider the complaint in its entirety.” *Tellabs*, 551
3 U.S. at 322. “The inquiry . . . is whether all of the facts alleged, taken collectively, give rise to a
4 strong inference of scienter, not whether any individual allegation, scrutinized in isolation,
5 meets that standard.” *Id.* at 322–23. Scienter is adequately alleged when “a reasonable person
6 would deem the inference of scienter cogent and at least as compelling as any opposing
7 inference one could draw from the facts alleged.” *Id.* at 324.

8 According to Plaintiff, Defendant “intended to sell OMI tokens that he would otherwise
9 have been unable to sell at his desired price or, alternatively or additionally, because he knew
10 that Hable would not buy the tokens if he knew the truth.” (FAC ¶ 74). Defendant moves to
11 dismiss, arguing that the FAC lacks substantive allegations about his intent to deceive or
12 manipulate. (Mot. Dismiss 18:24–27). Defendant argues that the more plausible explanation
13 for his statements is that they were truthful and innocent. (*Id.* 18:27–19:1). In his Response,
14 Plaintiff maintains that a finding of scienter is the only explanation as to why Defendant would
15 mention the litigation settlement to Plaintiff during the sale, even though Plaintiff did not
16 directly ask Defendant about the Singapore litigation. (Resp. 17:3–18).

17 Considering the FAC in its entirety, the Court does not find that all facts alleged, taken
18 collectively, give rise to a strong inference of scienter. The first alleged misrepresentation or
19 omission was written by Defendant six months prior to his sale of OMI to Plaintiff, and nothing
20 alleged in the FAC allows the Court to infer that it had anything to do with Defendant’s
21 planned sale of OMI to Plaintiff. If Defendant merely “sought to alleviate negative market
22 information arising from public discussions about the Singapore litigation,” (FAC ¶ 30), this
23 motivation does not lead to an inference of intent to deceive, or even deliberate recklessness.

24 Defendant’s second statement, directly to Plaintiff, does little to support an inference of
25 scienter. This statement was made to Plaintiff in response to the following message from

1 Plaintiff: “I learned that you were responsible for the OMI tokenomics [an industry term for the
2 design structure of a crypto token] which I find very interesting.” (FAC ¶ 44). Taking as true
3 Plaintiff’s allegation that the Singapore litigation “made potential buyers of OMI wary,” (*id.* ¶
4 25), the Court finds that the purpose of Defendant’s statement was more likely to ensure
5 Plaintiff that the *Singapore* litigation had ended rather than to deceive Plaintiff into believing
6 that *all* litigation involving Ecomi or Orbis had ended. Defendant’s omission of the second
7 lawsuit may have been reckless or negligent, but the facts alleged do not demonstrate a strong
8 inference of *deliberate* recklessness. Thus, Plaintiff has not adequately alleged that Defendant
9 had the requisite state of mind.

10 **3. Reliance**

11 A 10(b) cause of action requires reliance on the defendant’s deceptive act because it
12 ensures the “requisite causal connection between a defendant’s misrepresentation and a
13 plaintiff’s injury.” *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988). Defendant argues that
14 Plaintiff failed to adequately plead reliance because the FAC’s statements are conclusory. (Mot.
15 Dismiss 19:14–17). But the FAC does allege that Plaintiff relied on Defendant’s statements
16 when purchasing OMI, and the Court must take this factual allegation as true. (*See* FAC ¶¶ 1,
17 73). Therefore, the Court finds that Plaintiff sufficiently pled the reliance element.

18 **4. Loss causation**

19 Loss causation, “i.e. a causal connection between the material misrepresentation and the
20 loss” experienced by the plaintiff, is a necessary element of pleading a securities fraud claim
21 under section 10(b) of the Exchange Act. *Dura Pharm., Inc.*, 544 U.S. at 342. The complaint
22 must allege that the “share price fell significantly after the truth became known.” *Id.* at 347.
23 “Typically, ‘to satisfy the loss causation requirement, the plaintiff must show that the revelation
24 of that misrepresentation or omission was a substantial factor in causing a decline in the
25 security’s price, thus creating an actual economic loss for the plaintiff.’” *Nuveen Mun. High*

1 *Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1119 (9th Cir. 2013) (quoting
2 *McCage v. Ernst & Young, LLP*, 494 F.3d 418, 425–26 (3d. Cir. 2007)). Loss causation
3 allegations may be insufficient where a “modest” drop in the stock prices coincides with the
4 disclosure of certain news but then “recover[s] very shortly after.” *Wochos v. Tesla*, 985 F.3d
5 1180, 1197 (9th Cir. 2021) (citing *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d
6 1049, 1064–65 (9th Cir. 2008)).

7 Plaintiff alleges that the publication of the BusinessDesk article led to a “drastic”
8 decrease in token price. (FAC ¶ 42). “On June 7, 2022, the day before the article came out,
9 OMI was trading for \$.00163228 per token. By June 13, OMI was trading for \$.001038 per
10 token, representing a decline of 36% in just six days.” (*Id.*). Plaintiff further alleges that the
11 news of the New Zealand litigation likely began to spread amongst insiders prior to the release
12 of the BusinessDesk article, which would explain another drop in the price of OMI of 41% in
13 the weeks prior to the article being published. (*Id.* ¶ 43).

14 Defendant argues that Plaintiff did not sufficiently plead loss causation for four primary
15 reasons: (1) the drop in OMI token price began six weeks prior to the publication of the
16 BusinessDesk article; (2) historical pricing information reveals that the OMI token price did not
17 fall for several days following the publication; (3) the more plausible reason for the price drop
18 was the downturn of the entire cryptocurrency market; and (4) the token price recovered above
19 the June 7, 2022, price by July 7, 2022. (Mot. Dismiss 12:14–15:25). The Court addresses each
20 of Defendant’s arguments in turn.

21 Beginning with Defendant’s first argument, the Court agrees with Defendant that loss
22 causation is measured by the market’s reaction to the revealed truth, not by losses that took
23 place before the revelation. “To adequately plead loss causation, the Court held, a plaintiff
24 must allege that the ‘share price fell significantly after the truth became known.’” *In re Oracle*
25 *Corp. Sec. Litig.*, 627 F.3d 376, 392 (9th Cir. 2010) (quoting *Dura Pharm., Inc.*, 544 U.S. at

1 344–45)). “The market need not know at the time that the practices in question constitute a
2 ‘fraud,’ nor label them ‘fraudulent,’ but in order to establish loss causation, the market must
3 learn of and react to those particular practices themselves.” *Id.* (citing *Metzler*, 540 F.3d at
4 1063). But even ignoring the alleged 41% drop in the six weeks before the article’s
5 publication, Plaintiff still alleges a 36% price drop post-publication. So this argument does not
6 defeat Plaintiff’s loss causation allegations.

7 And as to Defendant’s second argument, because the Court declines to take judicial
8 notice of historical OMI pricing at this stage in the litigation, the Court accepts the FAC’s 36%
9 price decrease allegation as true.

10 Third, the Court disagrees with Defendant that the downward trend of the entire
11 cryptocurrency market is a far more plausible explanation for OMI’s price decline. Even
12 though the Court takes judicial notice that the market was aware of the reported market decline,
13 the Court nonetheless finds that the revelation of the New Zealand litigation was properly
14 alleged as a substantial factor in the price decline. The Court does not take judicial notice of
15 the truth of the allegations contained in the news articles, namely, that the cryptocurrency
16 market actually *was* in a steep decline during the relevant period. It is plausible that the market
17 was aware of the stories discussing the cryptocurrency market’s overall decline, and that is one
18 of the factors contributing to the price decline. But until a fact-finder determines just how
19 closely OMI’s decline did or did not follow the market, the Court cannot affirmatively decide
20 that Defendant’s explanation is “far more plausible” than Plaintiff’s explanation. *See Metzler*,
21 540 F.3d at 1065.

22 Defendant also cites three Ninth Circuit cases for the proposition that loss causation is
23 not properly alleged when the stock price quickly recovers. (Mot. Dismiss 15:8–17).
24 According to Defendant, the OMI token price was fully recovered by July 7, 2022, exactly one
25 month after the article’s publication. (*Id.*). In the cases cited by Defendant, however, the stock

price recovered in mere days. *See Metzler*, 540 F.3d at 1065 (finding no loss causation when the stock rebounded within three trading days); *Loos v. Immersion Corp.*, 762 F.3d 880, 889 (9th Cir. 2014) (discussing the three-day recovery in *Metzler*); *Wochos*, 985 F.3d at 1197 (no loss causation where the stock price rebounded on the next trading day). Because these cases are distinguishable from the facts in this case, the Court finds that Plaintiff plausibly pled loss causation. However, because Plaintiff did not properly plead a material misrepresentation whose revelation caused the alleged drop in stock price, the fact that he has properly pled loss causation does not rescue the fatal flaw in his federal securities claim.

C. Nevada Securities Act Claim and Fraud Claim

Plaintiff alleges that the same two misrepresentations referenced above also constitute a violation of the Nevada Securities Act and common law fraud. Like the Federal Securities Act, Section 90.570(2) of the Nevada Revised Statutes requires a false statement of material fact or an omission of a material fact:

In connection with the offer to sell, sale, offer to purchase or purchase of a security, a person shall not, directly or indirectly:

2. Make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in the light of the circumstances under which they are made

To state a claim for fraudulent misrepresentation under Nevada law, Plaintiff must allege “(1) a false representation made by the defendant; (2) defendant’s knowledge or belief that its representation was false or that defendant has an insufficient basis of information for making the representation; (3) defendant intended to induce plaintiff to act or refrain from acting upon the misrepresentation; and (4) damage to the plaintiff as a result of relying on the misrepresentation.” *Barmettler v. Reno Air, Inc.*, 956 P.2d 1382, 1386 (Nev. 1998). Because Plaintiff has failed to allege a material misrepresentation or omission, as explained above, he

1 has failed to properly allege claims for violation of the Nevada Securities Act and common law
2 fraud. Accordingly, these claims must also be dismissed.

3 **D. Leave to Amend**

4 If the court grants a motion to dismiss for failure to state a claim, leave to amend should
5 be granted unless it is clear that the deficiencies of the complaint cannot be cured by
6 amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). Pursuant
7 to Rule 15(a), the court should “freely” give leave to amend “when justice so requires,” and in
8 the absence of a reason such as “undue delay, bad faith or dilatory motive on the part of the
9 movant, repeated failure to cure deficiencies by amendments previously allowed, undue
10 prejudice to the opposing party by virtue of allowance of the amendment, futility of the
11 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Because this is the Court’s first
12 dismissal, and Plaintiff may be able to plead additional facts to support his claims, the Court
13 GRANTS Plaintiff leave to file an amended complaint within 14 days of the date of this Order.

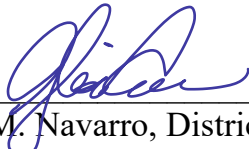
14 **V. CONCLUSION**

15 **IT IS HEREBY ORDERED** that Defendant’s Motion to Dismiss, (ECF No. 26), is
16 **GRANTED**, but the Court dismisses the case **without prejudice**.

17 **IT IS FURTHER ORDERED** that Plaintiff shall have 14 days from the date of this
18 Order to file an amended complaint. Failure to file an amended complaint by the required date
19 will result in the Court dismissing Plaintiff’s claims with prejudice.

20 **IT IS FURTHER ORDERED** that Defendant’s Motion for Judicial Notice, (ECF No.
21 27) is **GRANTED in part and DENIED in part**.

22 **DATED** this 12 day of December, 2023.

23
24 
25 _____
Gloria M. Navarro, District Judge
UNITED STATES DISTRICT COURT